No. 86-1024

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS,
FLORIDA DEPARTMENT OF BANKING AND FINANCE,
FLORIDA BANKERS ASSOCIATION AND
SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
and U.S. TRUST CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents, Board of Governors of the Federal Reserve System ("Board") and U.S. Trust Corporation ("U.S. Trust") have raised three basic arguments in opposition to the Petition. Each of these contentions is without merit.

1. Respondents first say that the issue is controlled by this Court's decision in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986) (*"Dimension"*).[1] However, as Petitioners already have shown,[2]

[1] Brief of the Board ("Board Br.") at 8-9; Memorandum of U.S. Trust ("U.S. Trust Br.") at 6-11.

[2] Petition for Certiorari ("Pet.") at 11-12.

this Court did *not* decide in *Dimension* the issue presented in this case—namely, whether a *regulated* bank holding company, which already owns at least one "bank" as defined in Section 2(c) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 *et seq.* ("BHC Act"), may acquire an *additional* deposit-taking, chartered bank across state lines without complying with Section 3(d) of the BHC Act (the "Douglas Amendment"). This Court did not specifically refer to the Douglas Amendment in *Dimension*.[3] Moreover, it is of particular significance that the Tenth Circuit Court of Appeals *expressly declined* in *Dimension* to consider the Douglas Amendment:

> [N]or do we feel it necessary to discuss the Douglas Amendment although it is a significant factor in the mix of state and federal regulation.

Dimension Financial Corp. v. Board of Governors, 744 F.2d 1402, 1410 (10th Cir. 1984), *aff'd* 106 S. Ct. 681 (1986). The issue presented in this case thus was not even before this Court when it decided *Dimension*.[4]

2. Respondents also suggest that *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*BT Investment*"), supports their claim that a chartered, deposit-taking bank is not an "additional bank" for purposes of the Douglas Amendment.[5] *BT Investment*, however, provides no authority for Respondents' position.

In *BT Investment*, this Court struck down a state statute that prohibited out-of-state bank holding companies from establishing *nonbanking* subsidiaries providing investment advisory services. This Court concluded

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[3] *See id.* at 12 n.27.

[4] Indeed, the Board itself appears to recognize that this issue was not decided by this Court in *Dimension* since the Board states that this issue "has now been addressed only by a single court of appeals . . . ." Board Br. 6.

[5] U.S. Trust Br. 15-16; Board Br. 7-8.

that the Douglas Amendment did not apply to such subsidiaries, which neither were chartered as banks nor provided *any* banking services. The result in *BT Investment* is clearly distinguishable from this case, where U.S. Trust has established an out-of-state subsidiary which is chartered as a national *bank* and provides *banking* services, including the acceptance of demand deposits and savings accounts and the making of consumer loans.

Thus, *BT Investment* held that the Douglas Amendment did not apply to a *non*-banking entity, and that it only applies to banking institutions. Respondents agree. Therefore, the issue here is whether U.S. Trust's banking subsidiary in Florida *is* an "additional bank" for purposes of the Douglas Amendment.

Indeed, this Court's opinion in *BT Investment* supports Petitioner's contention that the Douglas Amendment *does* apply to U.S. Trust's subsidiary bank in Florida. In *BT Investment*, this Court stated that the Douglas Amendment was intended to prohibit bank holding companies, absent state authorization, from "expanding into *banking* across state lines." 447 U.S. at 47 (emphasis added). This Court also pointed out that the Douglas Amendment was designed to prevent bank holding companies from using the holding company device as a means to evade the prohibition in the McFadden Act of 1927, as amended (12 U.S.C. § 36), against interstate branching by national banks. *Id. Accord, Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 169-72 (1985). As Petitioners have shown (*see* Pet. 15-16), the McFadden Act would *not* permit U.S. Trust to establish a national bank in New York with a Florida branch that provides the *banking* services now being offered by U.S. Trust's national bank in Florida. Accordingly, U.S. Trust's Florida bank plainly violates the Douglas Amendment as construed in both *BT Investment* and *Northeast Bancorp*.

3. Respondents finally contend that the legislative history of the BHC Act is consistent with their claim that

the definition of "bank" in Section *2(c)* must be applied automatically to the term "additional bank" in Section *3(d)*, the Douglas Amendment.[6]

Significantly, the Board *concedes*, based upon the cases cited by Petitioners, that the term "additional bank" in the Douglas Amendment could properly be given a meaning *different* from the definition of "bank" in Section 2(c) "if that plainly is Congress' intent."[7] This concession is of critical importance, because the pertinent legislative history demonstrates that Congress did *not* intend to alter the meaning of the term "additional bank" in the Douglas Amendment when it *did* change the definition of "bank" under Section 2(c) in 1970.

Petitioners have shown (*see* Pet. 14-16) that both the Douglas Amendment *and* Section 2(c), as originally enacted in 1956, applied to *all* chartered national and state banks. The prohibition in the Douglas Amendment against interstate acquisitions of deposit-taking banks, absent state authorization, reflected Congress' recognition that (i) deposits provide banks with their primary resource for extending credit and making investments, and (ii) state control over the acquisition of deposit-taking banks would accordingly be necessary to ensure a decentralized, unconcentrated banking system responsive to local consumer and business needs.[8]

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[6] Board Br. 7, 9; U.S. Trust Br. 11-15.

[7] Board Br. 7 n.1, citing *Cass v. United States*, 417 U.S. 72, 76-84 (1974); *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 435 (1932). The Board's concession confirms the error of the court below in holding that the definition of "bank" in Section 2(c) *must* be applied to the Douglas Amendment *regardless* of congressional intent. *Florida Dept. of Banking and Finance v. Board of Governors*, 800 F.2d 1534, 1536 (1986), Pet. Appendix ("App.") 51a-52a.

[8] *See* Pet. 16 n.35, and the authorities cited therein. U.S. Trust asserts (U.S. Trust Br. 12-13) that the Douglas Amendment did not apply to *all* deposit-taking banks in 1956 since the "Morris Plan"

In 1966, Congress strengthened the Douglas Amendment and amended the definition of "bank" in Section 2(c) to include all institutions that accepted demand deposits.[9] Respondents have not disputed that U.S. Trust's Florida bank would have been both a "bank" under Section 2(c) *and* an "additional bank" under the Douglas Amendment as both statutes were revised in 1966.

Thus, the sole issue to be resolved in this case is whether Congress intended that the meaning of "additional bank" in the Douglas Amendment would be narrowed in 1970, when Congress amended the definition of "bank" in Section 2(c) by adding the commercial loan test. Significantly, Respondents do not dispute the explicit findings of the Board and the court below that the automatic application of the 1970 amendment to Section 2(c) would "undermin[e]" and "destroy" the original purpose of the Douglas Amendment.[10] Moreover, Respondents do not contest that (as the court below held in *both* of its

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industrial banks were exempted from the 1956 BHC Act. U.S. Trust ignores the fact that the Morris Plan Corp. and its banks were excluded *only* because their parent holding company, Equity Corp., was expressly exempted under Section 2(a)(B) of the 1956 BHC Act, due to Equity Corp.'s status as a registered investment company. Act of May 9, 1956, ch. 240, § 2(a)(B), 70 Stat. 133. But for the specific exclusion of Equity Corp., the Morris Plan industrial banks *would* have been "banks" for purposes of Section 2(c) and the Douglas Amendment (as, indeed, *other* industrial banks *were* treated as "banks") if they accepted deposits similar to those taken by commercial banks. 102 Cong. Rec. 6942, 6948, 6950-51 (1956) (remarks of Sen. Morse); *id.* at 6957 (colloquy between Sen. Martin and Sen. Robertson); *id.* at 6963 (statement by Sen. Capehart). *See Applicability of Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 165, 166 (1963).

[9] *See* Pet. 16-17.

[10] *U. S. Trust Corp.*, 70 Fed. Res. Bull. 371, 372, 373 (1984), App. 3a, 6a; *Florida Dept. of Banking and Finance v. Board of Governors*, 760 F.2d 1135, 1141 (1985), App. 23a. *See also* Board Br. at 3-4, 5.

opinions) there is no evidence to suggest that Congress intended the 1970 amendment to Section 2(c) to affect the existing scope of the prohibition contained in the Douglas Amendment.[11]

In the face of this congressional silence as to the effect of the 1970 amendment to Section 2(c) upon the Douglas Amendment, the Board argues (Board Br. 7 n.1) that it is Petitioners' "obligation to offer specific evidence" that Congress did *not* intend to change the Douglas Amendment. The Board offers no support for this assertion, and in fact it is wrong. In similar cases, this Court has *refused* to hold, absent a clear showing of legislative intent, that Congress rescinded the fundamental purpose of a statute merely by changing a definitional provision.[12]

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[11] 800 F.2d at 1535-36 and n.2, App. 48a-49a; 760 F.2d at 1140-42, App. 23a-28a. *See also* Board Br. 7 n.1, 9-10 n.3; U.S. Trust Br. 13 n.16.

[12] *FDIC v. Philadelphia Gear Corp.*, 106 S. Ct. 1931, 1935-37 (1986) (1960 amendment to definition of "deposit" in Federal Deposit Insurance Act did *not* alter fundamental purpose of the Act, as adopted in 1933, to protect the "assets and 'hard earnings' " of depositors); *Cass v. United States*, 417 U.S. 72 (1974) (1962 amendment to definition of "year" in 10 U.S.C. § 687(a) did *not* rescind fundamental purpose of statute, as enacted in 1956, to require reservists to complete five *full* years of active duty in order to become eligible for readjustment pay). *See also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) ("repeals by implication are not favored," and therefore the intention to repeal a statute must be "clear and manifest").

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the final judgment of the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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